

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN B. ROBBINS, JUDGE

DIVISION IV

CA 06-1268

CARTER & COLE TIRE SERVICE,
INC. and AIG CLAIM SERVICES

APPELLANTS

V.

APPEAL FROM THE WORKERS'
COMPENSATION COMMISSION
[NO. F407747]

MAY 16, 2007

JOHN T. WOODS, SECOND INJURY
FUND, and DEATH & PERMANENT
TOTAL DISABILITY TRUST FUND

APPELLEES

AFFIRMED

Appellee John T. Woods sustained a compensable injury to his lower back while working for appellant Carter & Cole Tire Service on July 15, 2004. The appellant accepted the claim and paid medical benefits as well as benefits for a thirteen-percent permanent anatomical impairment rating. A dispute arose over Mr. Woods's entitlement to wage-loss disability benefits, and after a hearing the ALJ awarded forty percent wage-loss over and above the thirteen percent anatomical impairment rating.¹ The Workers' Compensation Commission affirmed and adopted the opinion of the ALJ. Carter & Cole now appeals, arguing that there is no substantial evidence to support the Commission's decision that

¹The Second Injury Fund was a party to the proceedings below, but the ALJ found it had no responsibility for the wage-loss because there was no evidence of any pre-existing impairment or disability. This finding is unchallenged, and thus Second Injury Fund has no interest in the outcome of this appeal.

Mr. Woods is entitled to wage-loss disability benefits. Mr. Woods has cross-appealed, arguing that the Commission erred in failing to award permanent total disability benefits. We affirm on direct appeal, and we affirm on cross-appeal.

When reviewing a decision of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission and affirm that decision if it is supported by substantial evidence. *Ritchie Grocery v. Glass*, 70 Ark. App. 22, 16 S.W.3d 289 (2000). Substantial evidence is that relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *Oliver v. Guardsmark, Inc.*, 68 Ark. App. 24, 3 S.W.3d 336 (1999). The Commission's decision should not be reversed unless it is clear that fair-minded persons could not have reached the same conclusions if presented with the same facts. *Johnson v. Democrat Printing & Lithograph*, 57 Ark. App. 274, 944 S.W.2d 138 (1997).

Mr. Woods testified at the hearing held on January 5, 2006. He stated that he is forty-one years old and completed the ninth grade. Mr. Woods stated that he can read and write, but has not obtained his GED or had any formal education since high school. He testified that although he once drove a truck for a six-month period, "I have pretty much been a tire buster (mounting and balancing tires) and a mechanic all my life."

Mr. Woods had worked for Carter & Cole for approximately fourteen years and was earning about \$650 per week prior to his work injury on July 15, 2004. On that day, he was moving equipment with a dolly when he bent over and his back popped, causing him to go to the ground. Mr. Woods laid on the ground for three to five minutes, and then reported the injury to one of the appellant's owners. He left work and went home and laid down,

hoping that his condition would resolve. However, the pain persisted and Mr. Woods reported to the emergency room that evening, and he was admitted to the hospital for two days.

The initial medical reports documented complaints of severe back pain. An MRI was performed, which detected a herniated disc at the L5 level. Mr. Woods subsequently came under the care of a neurosurgeon, Dr. Rodney G. Olinger. Dr. Olinger performed a left L5 hemilaminotomy and microdisectomy on August 17, 2004. On October 28, 2004, Dr. Olinger reported:

I will set him up with a pain management specialist for blocking, probably epidural and possibly specific sciatic nerve block. Hopefully, if that helps him, we can get him back to work. He is very anxious to return to work. Certainly at this point he is not capable of working, he probably can do something sedentary but I think we should wait for blocking and hopefully make some plans for return to some kind of lighter work initially.

Pursuant to Dr. Olinger's referral, Mr. Woods began treatment with a pain management specialist, Dr. Stephen L. Gipson. Dr. Gipson treated Mr. Woods with nerve root injections, physical therapy, and pain medication. On December 2, 2004, Dr. Gipson reported that Mr. Woods was "making slow if not poor progress" and that, "he has what I would call battered root syndrome or post-laminectomy syndrome." On April 5, 2005, Dr. Gipson reported:

Unfortunately, I think he is going to be left with this problem for an indeterminate period of time. It is now seven months after surgery and there has been no appreciable improvement. He came to tears several times when discussing how much he hurts and how limited he is and he says he cannot mow his own yard or do any kind of things around the house without incapacitating pain. He has attempted to do some walking and has been unable to do that as well for the same reason.

. . . .

I phoned and discussed this with Dr. Olinger. I am sending him back over to Dr. Olinger to get a nerve conduction study and possibly another MRI. If all this points to radiculopathy without anatomical abnormality, the only remaining treatment that I have available is a spinal cord stimulator. I discussed this with Dr. Olinger and he is in agreement, and I have returned him there for this consideration.

Although a spinal cord stimulator was proposed by Dr. Gipson as a possible treatment, it had not yet been administered at the time of the hearing.

On April 28, 2005, Dr. Olinger reported that Mr. Woods had reached maximum medical improvement, and that he suffered from failed back syndrome with continued root irritability. Dr. Olinger advised that Mr. Woods return to Dr. Gipson for pain control, and stated, "I feel he is capable of light and supervisory work." Dr. Olinger subsequently assigned a thirteen-percent permanent anatomical impairment rating.

Mr. Woods was also seen by Dr. A. Roy Tyrer, Jr., for an independent medical evaluation. In a report dated March 31, 2005, Dr. Tyrer gave the opinion, "I do not think he will be able to return to the type of work he previously was accustomed to doing but I think he should be able to return to work of a light to moderate nature if it is available."

In his testimony, Mr. Woods maintained that he has not returned to work since the time of the compensable injury due to his pain and physical limitations. He stated that he has pain from his lower back down his left leg, and that, "I get to hurting so bad, I can't stand it." Mr. Woods testified that he is sometimes able to perform limited house and yard work, but that most of the time he lies on the couch watching television. He stated, "On a typical day, it's gotten so I pretty much can't do anything." Mr. Woods further stated, "At this time, I don't know of any jobs that I am able to perform with my skills and physical condition."

On cross-examination, Mr. Woods acknowledged that he is able to drive a car and still has a commercial driver's license. He also acknowledged an occasion subsequent to the compensable injury where he went fishing with a friend in his friend's boat. Mr. Woods testified that he has made no attempt to seek any other employment and that he has made no effort to find a retraining or rehabilitation program. He acknowledged that as a career mechanic he would probably have extensive knowledge in a business such as a parts supply store. Mr. Woods testified that he is willing to try a spinal cord stimulator, and stated that his doctor thought it might alleviate his pain and give him the ability to return to work. Mr. Woods stated, "I wish I could be fixed so I could go back to work."

The only other witness to testify was Mr. Woods's sister, Brenda Deckelman. Ms. Deckelman testified that she sees Mr. Woods at least a couple of times a week. She stated that before his injury Mr. Woods did her yard work, but that since then he has been unable to do it. In Ms. Deckelman's observation, Mr. Woods's physical condition has gotten worse since the surgery. Ms. Deckelman did acknowledge that Mr. Woods is smart and agreed that he has the ability to be retrained in a management field.

On direct appeal, Carter & Cole argues that there is no substantial evidence to support the Commission's finding that Mr. Woods is entitled to wage-loss disability benefits. This issue is controlled by Ark. Code Ann. § 11-9-522(b)(1) (Repl. 2002), which provides:

In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Workers' Compensation Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity.

Pursuant to this statute, when a claimant has been assigned an anatomical rating to the body as a whole, the Commission has the authority to increase the disability rating, and it can find a claimant totally and permanently disabled based upon wage-loss factors. *Johnson v. Latex Constr. Co.*, 94 Ark. App. 431, __ S.W.3d __ (2006). Wage-loss disability is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Id.* In considering factors that may affect an employee's future earning capacity, the court considers the claimant's motivation to return to work, since a lack of interest or a negative attitude impedes our assessment of the claimant's loss of earning capacity. *Id.*

In its brief, appellant focuses on Mr. Woods's failure to seek any employment or additional education since the date of his compensable injury. Appellant notes that two physicians released Mr. Woods to light duty, and relies on Mr. Woods's testimony where he admitted that he is able to drive, perform housework, and go fishing. Carter & Cole asserts that Mr. Woods is intelligent and has extensive knowledge in automotive mechanics, and yet has made no attempt to whatsoever to return to work. Appellant contends that although Mr. Woods stated that he wants to return to work, all of the evidence is to the contrary. It argues that this court should consider Mr. Woods's lack of motivation in eliminating his wage-loss disability benefits.

We hold that there was substantial evidence to support the Commission's finding that Mr. Woods sustained permanent partial wage-loss disability as a result of the compensable injury. There were no medical opinions stating that Mr. Woods is capable of returning to anything more than light duty, and it is undisputed that no light-duty work was available with Carter & Cole. Mr. Woods suffered a significant permanent impairment to his back, and his

testimony indicated that he is in constant pain for which medication is necessary, and that he now has physical limitations. While Mr. Woods has made no effort to seek other employment, he explained that “I can’t with all the pain.” While there was some evidence indicating a lack of motivation to return to work, the evidence in its entirety supported the Commission’s award of forty-percent wage-loss disability.

Although not listed as a point on appeal, Carter & Cole also asserts in its brief that any award of wage-loss disability was premature because Mr. Woods was awaiting treatment by a spinal cord stimulator, which might give him the ability to return to work, even as a mechanic. However, we disagree. The parties stipulated that Mr. Woods’s healing period ended on May 19, 2005, at which time appellant accepted a thirteen-percent anatomical impairment rating. At the conclusion of the hearing, the ALJ stated that a spinal cord stimulator “certainly might reduce his entitlement to wage-loss disability if it changes his physical condition, but the parties have stipulated to the ending period and to the impairment, and, therefore, barring a change in his physical conditions through some follow-up medical care, that determination will be made based upon the record as it exists today[.]” These comments drew no objection from appellant, nor did appellant argue below that a decision on wage-loss disability was premature. From the medical reports of Dr. Gipson, it was uncertain as to whether or not a spinal cord stimulator would be administered. And in its opinion the Commission noted that in the event there is a reduction in Mr. Woods’s wage-loss disability, an application may be made to modify the award pursuant to Ark. Code Ann. § 11-9-713 (Repl. 2002). Under these circumstances, it was proper for the Commission to determine the extent of Mr. Woods’s wage-loss disability.

We now turn to Mr. Woods’s cross-appeal, where he argues that the Commission erred in failing to find him permanently and totally disabled. Pursuant to Ark. Code Ann. § 11-9-519(e)(1) (Repl. 2002), “‘Permanent total disability’ means inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment.” Mr. Woods contends that although he is highly motivated, his pain and physical limitations have rendered him unable to perform any employment for which he is qualified.

We hold that there was no error in the Commission’s failure to award permanent total disability benefits. Despite Mr. Woods’s testimony to the contrary, Drs. Olinger and Gipson both gave the opinion that Mr. Woods is capable of performing light-duty employment. It is within the Commission’s province to accept or reject medical opinion and to determine its medical soundness and probative value. *Epoxy Prods., Inc. v. Padgett*, 84 Ark. 147, 138 S.W.3d 118 (2003). In addition to the medical opinions, there was evidence that Mr. Woods is an intelligent man with extensive knowledge about the automotive mechanics field. There was substantial evidence to support the Commission’s decision to limit appellee’s wage-loss benefits to forty percent.

Affirmed on direct appeal; affirmed on cross-appeal.

HART and GLADWIN, JJ., agree.